



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 28, 2003

Ms. Cynthia Villarreal-Reyna
Section Chief, Agency Counsel
Legal and Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2003-7723

Dear Ms. Villarreal-Reyna:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190158.

The Texas Department of Insurance (the "department") received a request for sixteen categories of information about Legion Insurance Company and Villanova Insurance Company. You advise that the department is withholding information obtained during the course of an examination of a regulated entity pursuant to a previous determination issued in Open Records Letter No. 99-1264 (1999), which allowed the department to rely on Open Records Decision No. 640 (1996) to withhold such information. *See* Gov't Code § 552.301(a) (allowing governmental body to withhold information subject to previous determination); Open Records Decision No. 673 (2001). You state that some of the requested information will be provided to the requestor. You claim, however, that some of the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You contend that portions of

the submitted information are confidential pursuant to section 11(f) of article 21.28 of the Insurance Code. Section 11(f) provides that the Public Information Act (the "Act") "shall not apply to any records of a receivership estate, or to the records of an insurance company prior to its receivership, held by the receiver or by a special deputy receiver under this Article." Ins. Code art. 21.28 § 11(f). You inform us that the two companies at issue were placed in permanent ancillary receivership in Texas on February 19, 2003. You indicate that portions of the submitted information, which you have marked, are held by the department as receiver for the companies. *See* Ins. Code art. 21.28 § 2(a) (providing that the commissioner of insurance or person designated by commissioner under contract shall act as receiver for insurer placed in receivership); *see also* Ins. Code art. 21.21 § 2(1) (when performing duties of receiver, commissioner and special deputy receiver and their agents and employees shall be considered to be acting on behalf of receivership estate). Based on your representations and our review, we determine that the department must withhold the information you have marked under section 11(f) of article 21.28 of the Insurance Code pursuant to section 552.101 as information made confidential by law.

You have also marked portions of the submitted documents that you seek to withhold under section 552.101 in conjunction with article 1.15B of the Insurance Code. Article 1.15B provides in pertinent part:

Any information relating to the financial solvency of any organization regulated by the department under this code or another insurance law of the state obtained by the department's early warning system is confidential and is not subject to disclosure under [the Public Information Act].

Ins. Code art. 1.15B. You have marked information in the submitted documents that you indicate is maintained by the Early Warning Section of the department's Financial Division. Based on your representations and our review of the information at issue, we determine that the department must withhold this information pursuant to section 552.101 in conjunction with article 1.15B.

With respect to the remaining submitted information, we address your claim under section 552.107 of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340

(Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Finally, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets the definition of a confidential communication depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The remaining submitted information consists of e-mails between department attorneys and staff concerning regulatory matters of the department. You indicate that these e-mails are confidential communications made for the purpose of facilitating the rendition of professional legal services to the department, and that the confidentiality of the e-mails has been maintained. Upon review, we agree that this information, which we have marked, is protected by the attorney-client privilege. Accordingly, we conclude that the department may withhold the remaining submitted information pursuant to section 552.107 of the Government Code.

In summary, we have marked information that the department must withhold under section 552.101 of the Government Code in conjunction with section 11(f) of article 21.28 of the Insurance Code, as well as information that the department must withhold under section 552.101 in conjunction with article 1.15B of the Insurance Code. The remainder of the submitted information is protected by the attorney-client privilege and may be withheld under section 552.107 of the Government Code. Based on these findings, we do not reach your claim under section 552.111 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Saldivar', with a stylized flourish at the end.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 190158

Enc: Submitted documents

c: Mr. Mitchell S. King
Prince, Lobel, Glovsky, & Tye, L.L.P.
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Boston, Massachusetts 02109-1024
(w/o enclosures)